

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
LICENSE NO. 532266 and MERCHANT MARINER'S DOCUMENT 425-72-8528 D1  
Issued to: Don L. McFate

DECISION OF THE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2371

Don L. McFate

This appeal has been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 4 March 1983, an Administrative Law Judge of the United States Coast Guard at Port Arthur, Texas revoked Appellant's license upon finding him guilty of misconduct. The specification found proved alleges that Appellant, while serving as Assistant Engineer on board the M/V WARRIOR under authority of the above captioned documents did, on or about 16 September 1980, wrongfully assault and batter the Chief Engineer, Mr. Matthew P. Laving, with a deadly weapon, to wit, a knife, and inflicted severe bodily harm while the vessel was underway in San Juan Harbor, Puerto Rico.

The hearing was held at Port Arthur, Texas, on 25 January 1983.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced five documents and the testimony of two witnesses into evidence.

In defense, Appellant introduced his own testimony into evidence.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved, and served a written order on Appellant revoking his license.

The entire decision was served on 5 March 1983. Appeal was timely filed on 4 April 1983 and perfected on 9 August 1983.

FINDINGS OF FACT

On 16 September 1980, Appellant was serving as Assistant

Engineer aboard the M/V WARRIOR, an uninspected towing vessel of 199 gross tons. He was hired with the understanding that he would serve as Assistant Engineer aboard the M/V WARRIOR for one familiarization voyage, and then relieve the Chief Engineer, Mr. Matthew Lavin.

Appellant holds a Coast Guard license to serve as chief engineer of motor vessels of not more than 1000 gross tons and 10,000 horsepower while engaged in the mineral and oil industry. When he applied for employment as Chief Engineer aboard the M/V WARRIOR, he displayed his license to the owner. The owner, however, neither requested nor explicitly required possession of a license as a condition of employment. Mr. Lavin, whom Appellant was to relieve, did not have a Coast Guard license.

The M/V WARRIOR departed from Lake Charles, Louisiana on 6 September 1980 and arrived in San Juan, Puerto Rico on 15 September 1980. During the voyage, the relationship Appellant and Mr. Lavin was, at best, strained. Mr. Lavin became convinced that Appellant was not competent to serve as Chief Engineer and told him so on several occasions. Mr. Lavin testified that he told Appellant not to handle any of the equipment on board.

The M/V WARRIOR got underway from San Juan at about midnight on 16 September 1980. Shortly thereafter, Appellant was ordered to repair the air conditioner. He worked on it for a short time and then went to the galley. Mr. Lavin was awakened to assist in the repair work, and he proceeded to the galley.

When both men met in the galley a fist fight began. After receiving a few blows, Appellant picked up a galley knife from a table to defend himself. The knife had about a three inch handle and nine inch blade. He stabbed Mr. Lavin in the lower left side below the rib cage. Mr. Lavin was hospitalized with serious injuries as a result of the stabbing.

At the time of the incident, Mr. Lavin was twenty-five years old, five feet nine inches tall, and weighed about 155 pounds. Appellant was forty-four years old, six feet four inches tall, and weighed about 205 pounds. Appellant testified, however, that he is partially disabled because of a separated shoulder injury and could not throw a punch to defend himself.

Following the incident, Appellant was arrested and charged with assault and battery. He pleaded guilty and served six months in jail. The delay between the incident and the initiation of this proceeding was the result of the inability of the Coast Guard to locate Appellant, despite diligent and reasonable efforts to do so.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant urges the following:

1. That the Administrative Law Judge erred in finding that Appellant's license was a condition of employment.
2. That the battery was committed in self-defense; and
3. That the order revoking Appellant's license was excessive.

APPEARANCE: Marion McDaniel, Esq. of Eastham, Watson, Dale & Forney, Houston, Texas.

#### OPINION

The Administrative Law Judge found that Appellant was serving under the authority of his license at the time of the incident, and ordered the license revoked. Relying upon Appeal Decision No. 2058 (SEARS), however, the Administrative Law Judge held that Appellant was not serving under the authority of his document, and did not order any action against the document. Appellant assert that the Administrative Law Judge erred in finding that his license was required as a condition of employment. I agree.

#### A. Operating Under Authority of the License

A person serves under the authority of a license or document either when the license or document is required by law or regulation or is required in fact as a condition of employment. 46 CFR 5.01-35. The M/V WARRIOR, aboard which Appellant was serving as Assistant Engineer at the time of the incident, is an uninspected towing vessel of less than 200 gross tons. A license therefore was not required by law or regulation. See 46 U.S.C. 224a; 46 CFR 157.30-10(b). The Administrative Law Judge concluded, however, that the license was required as a condition of employment.

When Appellant applied for employment aboard the M/V WARRIOR, he displayed the license to the vessel owner. The Administrative Law Judge found that Appellant apprised the owner of his possession of a license to induce the owner to hire him. He reasoned that the owner was so induced in reliance upon Appellant's possession of a license, and the possession of the license thus became a "de facto" condition of employment.

The Administrative Law Judge's conclusion that possession of a license was required as a condition of employment is not supported by the evidence. The evidence shows only that the owner

was apprised of the fact that Appellant possessed a license. It does not show that the owner would not have hired Appellant had he not had a license. The owner did not explicitly require possession of a license, and the fact that Mr. Lavin, whom Appellant was to replace as Chief Engineer, did not possess a license, indicates that the owner did not deem possession of a license a prerequisite for employment. Therefore, Appellant's license was not required as a condition of employment.

#### B. Operating Under Authority of the Document

The Administrative Law Judge erroneously held that Appellant was not serving under the authority of his document, relying on Appeal Decision No. 2058 (SEARS). Sears was found guilty of misconduct while acting as the operator of an uninspected towing vessel. The Administrative Law Judge suspended both Sears' license and document. On appeal, suspension of the document was vacated because it was concluded that "in his position as operator of a towboat, Appellant was not acting under the authority of his merchant mariner's document." The decision does not indicate whether the vessel was over 100 gross tons.

Because a document is required by law and regulation for service aboard vessels over 100 gross tons, see 46 U.S.C. 643, 46 CFR 12.02-7, such service constitutes "acting under the authority" of the document. 46 CFR 5.01-35. To the extent that SEARS can be interpreted to prohibit revocation of a document where a seaman is serving aboard a vessel greater than 100 gross tons, it will no longer be followed. Therefore, Appellant was serving under the authority of his document, and the Administrative Law Judge should properly have directed the order against the document. However, because the severity of an order of the Administrative Law Judge may not be increased on appeal, the failure to revoke Appellant's document cannot be disturbed.

#### CONCLUSION

The findings of the Administrative Law Judge are not supported by substantial evidence of a reliable and probative character.

#### ORDER

The order of the Administrative Law Judge dated 4 March 1983 at Port Arthur, Texas is VACATED, the findings are SET ASIDE, and the charge and specification are DISMISSED

J. S. GRACEY  
Admiral, United States Coast Guard

Commandant

Signed at Washington, D.C., this 27th day of Sept. 1984.